**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

**ON APPEAL FROM THE COURT OF APPEALS
(JUDGES SAAD, WHITE, AND HOEKSTRA)
AND WORKERS' COMPENSATION APPELLATE COMMISSION**

**JACK D. HILL, Deceased,**
**By EDWARD F. HILL,**
Personal Representative,

Plaintiff-Appellee,

and

**AUTOMOBILE CLUB OF MICHIGAN,**

Intervening Plaintiff-Appellee,

vs.

**FAIRCLOTH MANUFACTURING COMPANY**
**and ACCIDENT FUND COMPANY,**

Defendants-Appellants.

S.C. No: 119363

C.A. No: 221335

L.C. No: WCAC 98-000144

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# INTERVENING PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

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# INTERVENING PLAINTIFF-APPELLEE'S BRIEF IN RESPONSE TO DEFENDANT-APPELLANTS' BRIEF ON APPEAL

Numbers in parentheses followed by "a" refer to Appellants' Appendix; numbers followed by "b" refer to Appellee's Appendix.

## COUNTER-STATEMENT OF FACTS

### Proceedings

This matter commenced with a petition filed by Jack D. Hill (hereinafter "Plaintiff") on June 3, 1991, alleging severe injuries and continuing disability arising from a motor vehicle accident on January 25, 1991, arising out of, and while in the course of his employment with

Faircloth Manufacturing Company (hereinafter "Defendant") under ***MCL 418.301(1); MSA 17.237(301)(1)*** (1a). On July 22, 1991, Automobile Club of Michigan (hereinafter "Intervening Plaintiff") filed a petition seeking reimbursement for no-fault benefits, including wage loss and medical, paid as a result of the motor vehicle accident of January 25, 1991 (1a). Plaintiff's petition was voluntarily withdrawn by his attorney on January 31, 1992, following Plaintiff's death on December 13, 1991 (1a).

Intervening Plaintiff subsequently filed a new petition, Form C, on July 9, 1992 (9a). Magistrate Trentacosta dismissed this petition pursuant to Defendants' motion on September 20, 1993 (2a). Intervening Plaintiff appealed the dismissal to the Workers' Compensation Appellate Commission, which reversed the Magistrate's decision and reinstated the petition on June 26, 1996. Defendants filed another motion to dismiss on August 21, 1997. Magistrate Sloss denied this motion on October 20, 1997 (2a).

The matter proceeded to trial on the merits on December 1, 1997, including introduction of exhibits. Plaintiff's supervisor, subpoenaed for trial, was unable to attend, and the record was finally closed on January 26, 1998, following the supervisor's testimony via deposition on January 12, 1998 (9a).

On February 18, 1998, the Magistrate issued the decision which denied Intervening Plaintiff's claim for reimbursement, finding that Plaintiff's injuries did not arise out of his employment. In the Magistrate's opinion, Plaintiff's injuries were the result of his diabetic condition, and his employment "did not cause, contribute to or aggravate his injuries at all" (12a). There was no analysis of the "personal risk" aspect of the claim.

Thereafter, Intervening Plaintiff appealed to the Workers' Compensation Appellate Commission (hereinafter "WCAC"), which issued its opinion on July 9, 1999. While ostensibly providing the requisite legal analysis of the personal risk doctrine, the WCAC denied benefits. Acknowledging Intervening Plaintiff's recitation from Professor Larson's treatise on this issue, the WCAC rejected the cited authority because it was not Michigan case law (15a).

The WCAC apparently tried to distinguish "level floor" cases from those where the employment circumstances caused or increased the actual injury, and compensation benefits were awarded. Acknowledging ***Ledbetter v Michigan Carton Co, 74 Mich App 330; 253 NW2d 753 (1977)*** to be controlling, the WCAC correctly summarized the rule of law:

> "Employees that suffer injury due to an event initially triggered by a personal, non work-related condition must demonstrate that their conduct of employment affairs put them in a position where the risk of injury increased." [15a]

The Commission then went on to insert an additional requirement by stating:

> "In order for an injury to be compensable, the risk posed by the employment situation must go beyond the common risks of everyday life." [15a]

The Commission cited ***Ledbetter supra***, as the legal basis for imposing this erroneous additional higher legal standard in order to find an injury compensable. Recognizing that the WCAC had imposed an erroneous legal standard to Intervening Plaintiff's claim, an Application for Leave to Appeal was filed with the Court of Appeals. Leave was granted on November 10, 1999 (5a).

On December 6, 2000, the Court of Appeals heard oral arguments in this case and ***Frazzini and AAA of Michigan v Total Petroleum.*** The Court consolidated the two cases on May 1, 2001, and issued a published opinion on May 11, 2001, which reversed the WCAC (6a).

The Court applied the "basic rule" as set forth in 1 Larson, ***Workers' Compensation Law, §9.01[1], p9-2.*** It held that Plaintiff's employment increased the dangerous effects of Plaintiff's diabetic seizure by placing him in a moving vehicle at the time of the seizure. Consequently, the injuries attributable to the motor vehicle accident "arise out of" Plaintiff's employment, and are compensable (20a).

Defendants-Appellants' Application for Leave to Appeal was granted by this Honorable Court. This brief is filed in support of the opinion issued by the Court of Appeals, which correctly applied the legal principles enunciated by Professor Larson, in ***§9.01(2)*** to find Plaintiff's injuries occurred in the course of his employment.

**History of Employment and Injury**

Much of the information pertaining to Plaintiff's employment was obtained from Patrick Keith Faircloth, son of Defendant's owner, employed as the estimator and supervising assistant in the shop (26a). Mr. Faircloth described Defendant's business as an automatic screw machine house which manufactures various components used by other companies in their own finished product (26a, 27a). He described the product as nuts, bolts, screws, and other fasteners involved in many different industries (27a).

Mr. Faircloth testified that in 1991, his father, William Andrew Faircloth, was the key management person (27a). Mr. Faircloth knew Plaintiff most of his life, and grew up with Plaintiff's children (27a). Since at least 1985, when Mr. Faircloth returned from the military, Plaintiff had been employed by Faircloth Manufacturing (26a, 27a). In January 1991, Plaintiff's classification was that of general shop laborer and truck driver (27a).

Plaintiff's duties included making deliveries using Defendant's 1978 Ford F50 truck (28a). Primary job duties usually involved shoveling metal chips from large square tubs into wheelbarrows which Plaintiff would then transport to a large dumpster for unloading (29a). Twelve machines emptied metal shavings into the tubs. It would take approximately two hours working at a good pace to remove all of the chips (30a).

The shipping department was also Plaintiff's responsibility (30a). Duties included confirming the count, gathering the parts, packaging them and preparing them for shipment (30a). He would also handle truck lines when they came in, and was in charge of physical shipment of parts (30a).

On the date of injury, January 25, 1991, Plaintiff was requested to transport some parts to another location for heat treatment processing (29a, 31a). Mr. Faircloth explained that some of the metal parts were too soft for the job requirements, and would be sent to a heat treatment facility several miles from Defendant's location, where the heat processing would strengthen the metal (31a).

Mr. Faircloth confirmed that, pursuant to the request of William Faircloth, Plaintiff was instructed to take a batch of parts for heat treatment at Thermo Process (32a). Plaintiff was told

to drive the company truck to deliver the parts, but he could not recall what time Plaintiff left (29a, 32a). Mr. Faircloth confirmed that Plaintiff was using the company truck at the time of the accident, adding that employees always used the shop truck for pick-ups and deliveries (3b).

Plaintiff's destination, north of 12 Mile and west of Groesbeck, was about two miles from Defendant's business, located north of 10 Mile and east of Groesbeck (31a, 32a). Mr. Faircloth confirmed that Plaintiff was traveling alone in the company truck, the same vehicle listed on the police report (32a, 28a). He also agreed that if the police report indicated the accident occurred at approximately 11:40 a.m., this would be consistent with Plaintiff's routine (32a, 33a).

Mr. Faircloth recalled that after a while when Plaintiff did not return to work, he became worried, and called Thermo Process (33a). Someone from Defendant either called or received a call from the police and was thus informed of the accident (33a). The accident occurred north of 12 Mile, beyond Plaintiff's turnoff for his destination (33a).

Mr. Faircloth went to the hospital and asked Plaintiff what happened (34a). Plaintiff told Mr. Faircloth that he was driving along and the next thing he knew he was in the hospital and couldn't remember anything (35a). In the hospital, Plaintiff had a "big" air cast on his knee (35a). Plaintiff never returned to work (35a).

After the accident, Plaintiff came by the shop on several occasions to visit and Mr. Faircloth testified that he would give him some money as a personal favor to help him out (35a). Except for these occasional visits or telephone calls, Mr. Faircloth had no personal

contact with Plaintiff after the injury (36a, 1b). He recalled that Plaintiff lived alone, and passed away in December 1991 from a possible myocardial infarction (1b).

Mr. Faircloth acknowledged that Plaintiff could not perform his former job and Defendant could not make accommodations for Plaintiff because of the severe disability occasioned by Plaintiff's knee problems (1b). Plaintiff was unable to perform a moving job, and the job he had held previously required physical strength, which Plaintiff did not have after the accident (1b).

Mr. Faircloth described Plaintiff as very conscientious, someone who would never deviate from a business related trip for personal reasons (37a). This evidence, presented by Defendant, was not rebutted. He could not explain why Plaintiff would be north of 13 Mile Road at the time of the accident unless it was due to his health problems or "whatever you want to call it" (37a). Mr. Faircloth acknowledged that he was aware of Plaintiff's diabetic problem, and testified that Plaintiff had suffered from diabetes for a long time (37a).

The Fraser Department of Public Safety Accident Report of January 25, 1991 (11a, 12a), confirms that Plaintiff was driving a 1978 truck registered to Faircloth Corporation. The time of the accident was recorded as 11:42 a.m. According to witnesses, Plaintiff seemed to be having a seizure of some sort at the time of the accident (12a).

Mr. Faircloth acknowledged that Plaintiff's knees and other health problems prevented him from returning to work at Faircloth Manufacturing (12a). Plaintiff could no longer do his job (12a).

## ARGUMENT I

THE COURT OF APPEALS PROPERLY APPLIED THE APPROPRIATE RULE OF LAW, FOUND IN 1 LARSON, ***WORKERS' COMPENSATION LAW, §9.01[1]*** AND ***[2]***, FIRST ADOPTED BY THIS STATE IN ***LEDBETTER V MICHIGAN CARTON CO.***, TO THE FACTS OF THIS CASE.

Standard of Review. This Court has the authority to review any issue of law raised by the WCAC opinion. ***MCL 418.861a(14); MSA 127.237(861a)(14), Corbett v Montgomery Ward & Co., 194 Mich App 624; 487 NW2d 825 (1992).*** Further, this August Tribunal may reverse the WCAC's decision if it operated within the wrong legal framework and/or if its decision is based on erroneous legal reasoning. ***Flynn v General Motors Corp, 162 Mich App 511; 413 NW2d 444 (1987).***

As a result of a motor vehicle accident on January 25, 1991, Plaintiff sustained serious and disabling injuries, including fracture of the right patella and lateral tibial plateau, fracture of the 5-6-7th ribs, concussion syndrome and multiple abrasions and contusions. Plaintiff's ongoing disability was established and detailed by the testimony of Patrick Faircloth, the assistant supervisor at Defendant. Mr. Faircloth explained that Plaintiff's job involved constant moving, shoveling metal chips which required great physical strength, and other activities which Plaintiff could no longer perform because of residuals of the motor vehicle accident, particularly the right knee (12a, 1b). Disability was not related to the underlying diabetic condition, but was solely the result of the motor vehicle accident.

In its review of the instant case, the Court of Appeals applied what Intervening Plaintiff submits was the correct test, as set forth in the case of ***Ledbetter v Michigan Carton Company, 74 Mich App 330; 253 NW2d 753 (1977).*** Described as a case of first impression, the Court adopted the majority rule involving "idiopathic" or "personal risk" workplace injuries set forth

in Larson, ***Workers' Compensation Law***. Professor Larson's treatise summarizes the prevailing law, evolution of legal principles, and minority positions and trends. The applicable portion of the treatise, ***§9.01***, is entitled, "Internal Weakness Causing Falls". Various subsections address different factual situations, including dangerous objects, falls from heights, and falls onto level floors. Separate factual/legal situations have produced different results. Larson's treatise has grouped similar situations, and reported the legal principles which produced the various results. For example, ***§9.01[2]*** addresses falls onto dangerous objects, and reports that compensation is almost uniformly awarded in these situations. Yet ***§9.01[3]***, addressing falls from heights, and ***§9.01[4]***, falls onto level floor, reflect different results. Section ***9.01[3]*** describes a gradual shift from denial to award of benefits where "height" was the employment contribution, and a split of authority, usually denying compensation benefits, is evident in ***§9.01[4]*** where the employer's only contribution was the floor upon which the employee was standing at the time of the fall. Quoting extensively from Professor Larson, the ***Ledbetter*** Court denied compensation benefits for a "level floor case," but also distinguished this:

> "from cases where compensation has been allowed for idiopathic falls from platforms, ladders, or onto some type of machinery." ***Id at 337***.

As noted by the ***Ledbetter*** Court, Professor Larson discusses idiopathic falls and other risks personal to the employee in ***Section 12.11, et seq.,***[1] also quoted by the Court of Appeals in the case at bar:

[1] As of May, 1999, this section has been changed to §9.01[1] "Increased-danger Rule Applied to Idiopathic Falls".

> "When an employee, solely because of a nonoccupational heart attack, epileptic fit, or fainting spell, falls and sustains a skull fracture or other injury, the question arises whether the skull fracture (as distinguished from the internal effects of the heart attack or disease, which of course are not compensable) is an injury arising out of the employment.
>
> The basic rule, on which there is now general agreement, is that the effects of such a fall are compensable if the employment places the employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle." [Footnotes omitted; emphasis added.]

***§9.01[2] (formerly §12.12.)*** goes on to state:

> "One line of cases finds the employment contribution in the presence of the employee near moving machinery or other dangerous objects. Awards are uniformly made when the employee's idiopathic loss of his or her faculties took place while he or she was in a moving vehicle, as in the case of a delivery worker whose job required the employee to be at the wheel of a truck and who "blacked-out" during an asthmatic attack and went into a ditch, and of an employee who was on a motor scooter when he lost consciousness. It seems obvious that the obligations of their employment had put these employees in a position where the consequences of blacking out were markedly more dangerous than if they had not been so employed." Larson, Workmen's Compensation Law, pp. 9-3--9-5 [Footnotes omitted; *emphasis added.]*

The other two subsections of the Personal Risk Section entitled "Personal Weakness Causing Falls" will be discussed more fully in Argument III.

In ***Ledbetter***, the court adopted the majority rule which distinguishes and denies compensation for "level floor cases" where the employee, while standing on the floor, fell to the floor without striking any other object which would increase the likelihood of injury. A similar result was reached in ***McClain v Chrysler Corp., 138 Mich App 723, 360 NW2d 284***

*(1984)*. These results are consistent with the cases cited by Defendants-Appellants, including ***Pucilowski v Packard Motorcar Co., 278 Mich 240, 270 NW 282 (1936)*** and ***Hopkins v Michigan Sugar Co., 184 Mich 87, 150 NW 325 (1916)***. In ***Van Gorder v Packard Motorcar Co., 195 Mich 588, 597, 162 NW107 (1917)*** though decedent fell "a short distance" from a scaffold, the court found such "de minimus" contribution insufficient for an award of compensation. Though factually a fall "from a height", the court's analysis is similar to a "level floor" approach. See Argument III. In short, the cases cited by Defendants involve factual situations, and legal results, more similar to ***Ledbetter***.

That same rule of law awards compensation where the employment has contributed to the risk or aggravates the injury as in the cases noted below. Consistent with Larson and the Court of Appeals, Intervening Plaintiff-Appellee submits the results should be the same, awarding benefits, in this case. Here, Plaintiff was driving the company truck, suffered some type of seizure or other physical problem which apparently impaired his driving ability, rear-ended another truck, and sustained serious injuries. The injuries from the accident disabled Plaintiff from his prior employment duties. This disability, related to the accident residuals, is compensable under ***Ledbetter*** and *Larson*.

Additional support for this majority rule is found in the publication "Workers' Compensation in Michigan: Law & Practice." Author Edward M. Welch describes this area of the law in Michigan at *§4.16*:

> *§4.16. The Michigan Court of Appeals has held in Ledbetter v Michigan Carton Co, 74 Mich App 330, 253 NW2d 753 (1977),* that a level-floor fall is not compensable unless there is evidence that the employment increased the risk of danger to the employee. Cases like this are sometimes referred to as "idiopathic fall"

> cases, but they are misnamed. *Idiopathic* is a medical term that means "self originated; of unknown causation." *Dorland's Illustrated Medical Dictionary 723 (24th ed 1965)*. Even a truly idiopathic fall would probably be compensable if the worker fell into a moving machine. Under *Ledbetter*, whether a level-floor fall is compensable does not depend on whether the cause of the employee's fall is known. The test is whether the employment *increased the risk of injury*. Thus, if the employment did not cause the worker to fall and did not increase the dangers encountered in falling, the injury is not compensable. On the other hand, if the work caused the fall *or* increased the dangers involving in falling, the injury can be said to have arisen out of and in the course of the employment and is compensable." [Citations omitted.]

Intervening Plaintiff acknowledges that Defendants would not be responsible for wage loss or medical benefits attributable to Plaintiff's diabetic condition, which apparently precipitated the motor vehicle accident. However, it is settled law in Michigan that if requirements of the employment aggravated or increased the effects of the injury, such injuries are compensable. This line of reasoning was also followed in ***Anderson v General Motors Corp, 1988 WCAB #13, 1 MIWCLR 3013***. Compensation benefits were granted when Plaintiff suffered a seizure of a personal nature and fell into a nearby assembly line while climbing stairs as part of his stock chasing duties.

While the factually similar cases cited in Professor Larson's treatise arise from jurisdictions such as Tennessee, Nebraska, New Mexico, Massachusetts, Maryland, Mississippi, Oregon, Virginia, Florida, New York, and Missouri, the rationale of the courts reflects the majority position, summarized by Professor Larson, that the requirements of the employment increased the dangerous effects of that employee's personal risk.

In ***Marshall v Bob Kimmel Trucking Co, 109 Or. App. 101, 817 P 2nd 1346 (1991)***, the Oregon Court of Appeals premised its award of compensation benefits on the fact that the risk of serious injury from plaintiff's loss of consciousness was greatly increased by the fact that he was driving the truck for his employer's benefit. Other jurisdictions have used similar rationales; all are consistent with the majority view in which the risk of injury related to the individual employee's personal risk was enhanced by the employment-related activities. The Michigan cases of ***Ledbetter***, *supra*, and ***McClain v Chrysler Corp, 138 Mich App 723; 360 NW2d 284 (1984)***, deny compensation where the injured employees, while standing on level ground, fell to the floor as a result of a situation personal to the injured employee, and did not strike any object while falling. In contrast, in the case at bar, the employment situation increased the likelihood of injury when Plaintiff apparently suffered complications from the preexisting diabetic condition. Plaintiff's employment obligations placed him in the company-owned truck at that time and place when his diabetes rendered him unable to drive. His truck continued to move until it hit another truck, seriously injuring Plaintiff as a result of the collision. The resultant disabling injuries were related to the collision, not the diabetes.

It is unrebutted that Defendant knew of Plaintiff's preexisting diabetic condition. It is further unrebutted that Plaintiff's employment placed him in a motor vehicle, performing a service for his employer, at the time he apparently suffered a diabetes-related seizure. Accordingly, the injuries sustained by Plaintiff in the resultant motor vehicle accident are compensable as a matter of law, as correctly found by the Court of Appeals. ***Ledbetter, supra; McClain, supra.***

Defendants' attempts to insert additional language, requiring "substantial" work contribution, lack any legal support. Similar to the WCAC's requirement of an "increased risk" employment contribution, such erroneous legal reasoning is without merit or support in the rule of law applicable to these facts. See ***Dennis v White (A. J.) & Co., 10 B.W.C.C. 280 (1917) [11b]*** where the English courts rejected a similar argument (11b). Even Defendants' attempts to quote Dr. Larson by carefully combing through the treatise reveal the fallacy of the argument. The quoted portions are excerpted from three different pages in the treatise. The title of the quoted ***section §901[4]*** says it all: "Falls Onto Level Floor." Not only are these types of claims routinely rejected, as noted by Professor Larson and ***Ledbetter***, but this section is not germane to the present inquiry, where Plaintiff was driving a motor vehicle at the time of the seizure. When one reads Defendant's quoted portions in context, one can readily ascertain the discussion involves the split of authority in the majority vs. minority rule in level floor cases. Intervening-Plaintiff attached the relevant treatise pages, 9-1 – 9-17 to its application so that this Court can read the salient sections in context.

## ARGUMENT II

ASSUMING A REMAND IS NECESSARY, THE COURT OF APPEALS PROPERLY REMANDED THIS MATTER TO THE MAGISTRATE FOR FACTFINDING ON AN ISSUE NOT ADDRESSED IN THE ORIGINAL DECISION BY THE MAGISTRATE.

Standard of Review. This Court has the authority to review any issue of law raised by the WCAC opinion. ***MCL 418.861a(14); MSA 127.237(861a)(14), Corbett v Montgomery Ward & Co., 194 Mich App 624; 487 NW2d 825 (1992).*** Further, this August Tribunal may reverse the WCAC's decision if it operated within the wrong legal framework and/or if its decision is based on erroneous legal reasoning. ***Flynn v General Motors Corp, 162 Mich App 511; 413 NW2d 444 (1987).***

The Magistrate did not address whether Mr. Hill was "in the course of his employment" at the time of the motor vehicle accident. Accordingly, the Court of Appeals ordered a remand for factfinding on this issue. Under ***MCL 418.861a, MSA 17.237(861a)***, both the Magistrate and the WCAC have fact-finding powers, though the powers of the WCAC are more limited.

The Court's action in remanding directly to the Magistrate simply saves time. The court specified that the Magistrate was to make the factual determination. In this way, the Magistrate could set forth his findings, and the basis therefor, to allow adequate review by the WCAC. ***Mudel v Great A & P Tea Co., 462 Mich 691, 614 NW2d 607 (2000)***. Defendants argue that the appropriate body for remand purposes would be the WCAC.

Intervening Plaintiff submits that, if remand is necessary, the proper procedure entails record review by the Magistrate and supplemental decision. ***Robertson v DaimlerChrysler Corp, ___ Mich ___ (Docket #116276, rel'd April 19, 2002).*** As a practical matter, such remand seems unnecessary. Though no specific finding was made, there is no conflicting

evidence to weigh or sift through to determine if Plaintiff was "in the course of" his employment at the time of the motor vehicle accident. Mr. Patrick Faircloth, Defendant's witness, who testified that Plaintiff was instructed to drive the company truck to another location, provided the only evidence on that point. Mr. Faircloth added that Plaintiff was very reliable, and never deviated from the assignment. In fact, it was Plaintiff's failure to return in a timely fashion which alerted his employer to check into his whereabouts. This in turn led them to discover that Plaintiff had been involved in an accident while driving the company truck. This testimony was provided by Defendant's witness, and is unrebutted. Where the facts are not in dispute, the question becomes one of law, so it is unnecessary to remand to the factfinder, Appellate courts review questions of law de novo. ***DiBenedetto v West Shore Hospital, 461 Mich 394, 605 NW2d 300 (2000)***. Interestingly, though Defendants claim error, they acknowledge that the WCAC may well remand the matter to the Magistrate.

## ARGUMENT III

THE FACTUAL AND LEGAL ANALYSIS OF ***VAN GORDER V PACKARD MOTORCAR COMPANY*** FALLS UNDER LARSON, ***WORKERS' COMPENSATION LAW §9.01[3]*** AND ***[4]***, NOT ***§9.01[2]*** WHICH PROVIDES THE CORRECT LEGAL ANALYSIS FOR THE ***HILL*** CASE; ACCORDINGLY, ***VAN GORDER*** IS DISTINGUISHABLE, AND NOT APPLICABLE TO THE CASE AT BAR.

Standard of Review. This Court has the authority to review any issue of law raised by the WCAC opinion. ***MCL 418.861a(14); MSA 127.237(861a)(14), Corbett v Montgomery Ward & Co., 194 Mich App 624; 487 NW2d 825 (1992).*** Further, this August Tribunal may reverse the WCAC's decision if it operated within the wrong legal framework and/or if its decision is based on erroneous legal reasoning. ***Flynn v General Motors Corp, 162 Mich App 511; 413 NW2d 444 (1987).***

In the order granting Defendants' Application for Leave to Appeal, this court requested the parties to consider the applicability of ***Van Gorder v Packard Motorcar Company***. Specifically, the parties were to address whether ***Van Gorder*** was consistent with the recent Court of Appeals' decision in this case, and if not, whether ***Van Gorder*** should be overruled. Intervening Plaintiff Appellee submits that one need look no further than Larson, ***Workers' Compensation Law*** to appreciate the distinction and the different legal principles to be applied. ***Van Gorder*** is inapposite to the ***Hill*** case. The facts of ***Van Gorder*** fall under ***§9.01[3]***, "Falls From Heights", though the legal analysis is more consistent with, and better explained in ***§9.01[4]***, "Falls onto Level Floors".

Early personal risk cases required a positive employment contribution, such as machinery or moving vehicles, to find that the resulting injury arose out of the employment. Reasoning that any fall would necessarily cause the employee to land on "a floor," the floor

would not be deemed an employment "contribution," and compensation was denied. As described in *§9.01[4][a]*, this view became the "majority rule" when some cases found the floor to constitute an employment contribution and awarded benefits, thus creating the minority rule:

> **[a] Case Law on Level-floor Fall Summarized**
>
> Inevitably there arrive the cases in which the employee suffers an idiopathic fall while standing on a level surface, and in the course of the fall, hits no machinery, bookcases, or tables. At this point there is an obvious temptation to say that there is no way of distinguishing between a fall onto a table and a fall onto a floor, since in either case the hazard encountered in the fall was not conspicuously different from what it might have been at home. A distinct majority of jurisdictions, however, have resisted this temptation and have denied compensation in level-fall cases. The reason is that the basic cause of the harm is personal, and that the employment does not significantly add to the risk. A significant minority, however, makes awards for idiopathic level-floor falls, but on close examination of the facts and opinion in these cases, the number is not as large as it has sometimes been thought to be. [Footnotes omitted.]

In *§9.01[3]*, Professor Larson chronicles the evolution of falls from heights as the courts gradually recognized "height" alone as an employment contribution:

> **[3] Falls from Heights**
>
> A parallel process has taken place in regard to falls from heights. The earliest case, ***Wicks v Dowell & Company***, decided in 1905, awarded compensation when an epileptic fell into the hatchway of a ship near which he stood in the course of his employment. But, at this stage of development of the law, a fall downstairs was distinguished and held outside the coverage of the act.[16] The story from this point on is one of a gradual decrease in the requisite height of the fall. In the ***Baltimore Dry Docks*** case, the fall was 45 feet, from a ship under construction; in the ***Corry*** case, it was 40 feet; in the ***Santacrose*** case, it was 15 feet from the top of a brick pile; in the ***Gonier*** case, it was 11 feet, from a scaffold; in ***Carroll v What Cheer Stables Company***, it was five feet, from the seat of a hack; in the ***Irby*** case, it was two feet; in

> the ***Milwaukee Electric*** case, it was perhaps 22 inches, from the third or fourth step of a stairway; and finally, in the 1985 Virginia case of ***Parson***, it was eighteen inches from the top of a milk crate.
>
> Since these injuries are deemed compensable because the employment put the employee in a position where the consequences of blacking out were markedly more dangerous than if the employee had been in a more benign location, it might make sense to require the employee to prove that the injury actually sustained was more serious than the sort of injury which would have occurred without the danger of the height, object, or other hazard within the workplace. At lease one employer has argued that point, but unsuccessfully. There the worker's injuries resulted from an idiopathic fall from a five-foot ladder. The court held that to require the employee to make such an apportionment of damage would be contrary to the theory of workers' compensation. The injured employee need only show that the employment increased the risk of injury. [Most footnotes omitted.]

Early cases, including ***Van Gorder***, looked only for a "positive employment contribution" which would contribute to the risk or aggravate the injury. Such contribution would not include the ground, or a floor, as gravity pre-ordained that falls would, of necessity, terminate at that level. Where there was no employment contribution, compensation benefits were denied.

Though ***Van Gorder*** admittedly fell from a scaffold, not while standing on the ground, the court obviously did not attach significance to this fact. Though duly reporting that Plaintiff was standing on "a scaffold about six feet in height" at the time of the injury, he struck nothing until he hit the floor. ***Id at 589-590.*** The industrial accident board determined that the concussion and fractured skull was due to Plaintiff's employment "on a scaffold some distance above the floor" and granted benefits. ***Id at 590.***

In contrast, the Court referred to "a few feet" and "a short distance", obviously minimizing the distance of the fall, and its effect on Plaintiff's injuries. ***Id at 597-598.*** The "de minimus" height of the scaffold was not sufficient to constitute an employment contribution, and benefits were denied. The decision was consistent with the then-prevailing opinion that height alone was generally not sufficient to impute an employment contribution. As documented by Larson, such opinion has been eroded over the years such that falling from a height of six feet may well constitute a sufficient employment contribution to justify an award of benefits. Other jurisdictions have found employment contributions at heights of five, two, and one and a half feet. However, that analysis is not germane to this inquiry, as Mr. Hill's injuries were caused when he was thrown against the interior of his employer's truck at the time of the impact. There can be no question of a positive employment contribution in causing serious physical injuries which rendered Mr. Hill unable to perform his employment duties. Unfortunately, the ***Van Gorder*** court did not have Larson's treatise, or the body of case law, at its disposal to fully appreciate the concept of employment contribution in personal risk situations.

Though the different factual situations require different analyses, the ***Van Gorder*** analysis has not passed the test of time, even within its own factual milieu. The court relies on two English cases, ***Butler v Burton-on-Trent Union, 5 BWCC 355 (1912)*** [9b] and ***Nash v The Rangatira, 3 K.B. 978 (1914)*** [35b]. The court also distinguished these cases from ***Wilkes or Wicks v Dowell & Company, 7 W.C.C.C. 14 (1905)*** [41b], where compensation was granted when a seaman suffered an epileptic seizure and fell into the hole of the ship sustaining serious

injuries. Among other things, the Court described the holding in ***Wilkes/Wicks*** as "materially minimized" by the later two cases.

As noted by the Court, ***Butler*** involved the master of workhouse who fell down some stairs in a coughing fit. What the ***Van Gorder*** court omitted was that the master, though admittedly on duty, was sitting at the top of the stairs, close to his own quarters, smoking a cigarette. The ***Butler*** court specifically noted that he was engaged in no active employment duties at the time. Further, plaintiff's attorney acknowledged that if the master, suffering from tubercular trouble, had been in his office at the time of the coughing fit, the accident would not arise out of the employment. Though this case is cited by Larson in ***§9.01[3]*** (footnote 16), a close reading of the case shows that compensation was denied because Plaintiff was not engaged in employment duties at the time of the coughing fit. Not surprisingly, this writer could find no cases citing the ***Butler*** case.

The second case relied upon in ***Van Gorder*** involved an intoxicated seaman. The facts in ***Nash*** are somewhat different in that Plaintiff lived on the ship, and when returning from leave, was injured while attempting to board the ship. ***Nash*** relied on ***Frith v S.S. Louisiana, 2 K.B. 155 (1912)*** [21b] to find plaintiff's injuries did not arise out of his employment. The opinion emphasizes that Plaintiff had not yet boarded the ship, and was not engaged in work duties, or returning to the ship to commence work duties, at the time of the injury. The court found no employment contribution to the injury, but instead related it solely to plaintiff's intoxication.

***Nash*** was later distinguished in ***Bulmer and Byron v S.S. Baluchistan, 27 B.W.C.C. 399 (1934)*** [35b] which found an employment contribution in the difficult-to-negotiate ladder which decedent had to use to gain access to the ship. Though intoxicated, plaintiff's fall from the ladder, and subsequent death from head injury and drowning, was found to be compensable.

***Van Gorder*** distinguished ***Wilkes/Wicks*** and minimized its importance. In ***Wilkes***, an epileptic seizure apparently caused a seaman to fall into the hold of the ship, suffering serious injuries. In awarding compensation, the court looked at the proximate cause of the injury, the fall, rather than the remote cause of the fall, the epileptic seizure. The court found that plaintiff's employment placed him into a dangerous position, rendering him more liable to injury because of his health condition. ***Id at 18***.

Yet other English cases continue to apply its legal principles. One such case, ***Martin v Finch, 30 B.W.C.C. 99 (1937)*** [27b] is also more factually similar to ***Hill*** than either ***Van Gorder*** or any cases it cites. Mr. Martin, a known epileptic, was advised by his doctor to stop riding his bicycle. Notwithstanding this advice, his employer continued to instruct him to transport tools on his bicycle for his use in the field. While so engaged in transporting tools, plaintiff apparently suffered an epileptic "fit," cashed his bicycle, and died from injuries suffered in the crash. Compensation was awarded, as plaintiff's injuries arose out of and in the course of his employment.

Plaintiff in ***Ironmonger v Vinter, 31 B.W.C.C. 90 (1938)*** [24b] also suffered from epilepsy. While employed in cleaning out a dyke, he apparently suffered a seizure and rolled down the incline, landing face down in water and mud. The cause of death was drowning. In

affirming an award of benefits, the court applied ***Wicks***. Among other considerations, it was emphasized that the work duties involved a peculiar danger, because of plaintiff's personal risk, that when plaintiff died, his death arose out of and in the course of his employment. Simply put, plaintiff's death was caused by an accident which resulted from his being put, by his employer, in a position of danger.

Another English case, ***Dennis v White (A. J.) & Co., 10 B.W.C.C. 280 (1917)*** [11b] neatly disposes of the reasoning advanced by the Workers' Compensation Appellate Commission, that the employment risk must "go beyond the common risks of everyday life". In this case, plaintiff's job duties involved riding a bicycle in London. While so engaged, a motorcar struck him. Five members of the House of Lords wrote separately, but unanimously, that plaintiff's injuries arose out of and in the course of his employment. All rejected the concept that the risks must be beyond those shared by the general public:

> It is quite immaterial that the risk was one which was shared by all members of the public who use bicycles for such a purpose. Such as it was, it was a risk to which the appellant (employee) was exposed in carrying out the orders of his employer. ***Id at 283***.

Both English and American courts rejected efforts to narrow the scope of the Act. They have required an employment contribution, but do not qualify or quantify the contribution to deprive injured claimants of their rights under the Act. Upon review of Larson's treatise and the cited English cases, ***Van Gorder*** may very well be vulnerable upon presentation of the appropriate factual scenario. The California Court of Appeals rejected the ***Van Gorder*** reasoning in 1946. An earlier decision, ***Brooker v Industrial Accident Commission, 176 Cal***

***275, 168 p 126 (1917)***, explicitly adopted the ***Van Gorder*** analysis. Yet less than 30 years later, in ***National Auto & Casualty Insurance v Industrial Acc. Comm'n, 75 Cal; App. 2d 677, 171 p 2d 594 (1946)***, California rejected the "extreme view" and "harsh rules" exemplified in ***Van Gorder***. In the later case, the employee struck his head on a sawhorse before striking the floor after suffering a seizure. In awarding compensation, the court noted that the overwhelming number of courts award compensation where the injury is contributed to by some factor peculiar to the employment, and cited the ***Wicks*** case. ***Id at 595***. The court also quoted ***Connelly v Samaritan Hospital, 269 N.Y. 137, 181 N.E. 76*** for the rule that whenever conditions incident to the employment are factors in the catastrophic combination, the consequent injury arises out of the employment. ***Id at 596***.

***Van Gorder*** may not have been overruled, but neither has it been followed in Michigan. The cases cited by Defendants distinguish ***Van Gorder***. Even ***Ledbetter***, with its consistent analysis, did not cite ***Van Gorder***. Rather, the court identified the issue as one of "first impression." ***Van Gorder*** reasoning has no place in Michigan law today.

The present case, presenting a different factual basis, necessitating a different legal analysis, is not controlled by ***Van Gorder***. Given ***Van Gorder's*** inapplicability to the case at bar, it is unnecessary to overrule ***Van Gorder***. Should ***Van Gorder*** be deemed applicable, it should be overruled.

## RELIEF REQUESTED

WHEREFORE, Intervening Plaintiff-Appellee respectfully requests that this Honorable Court affirm the decision of the Court of Appeals, find as a matter of law that Plaintiff's injuries arose out of and in the course of his employment, and provide any other relief to which Intervening Plaintiff-Appellee may be entitled.

Respectfully submitted,
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